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In the Supreme Court of the United States

OCTOBER TERM, 1966

No. 81

LEE E. A. PARKER,

Petitioner,

v.

CLARENCE T. GLADDEN,
Warden of the Oregon State Penitentiary,

Respondent.

BRIEF FOR RESPONDENT

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BRIEF FOR RESPONDENT

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In the Supreme Court of the United States

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No. 81

LEE E. A. PARKER,

Petitioner,

v.

CLARENCE T. GLADDEN, Warden,

Respondent.

BRIEF FOR RESPONDENT

Respondent prays that this Court affirm the judgment of the Supreme Court of Oregon in the above entitled case.

CITATIONS TO OPINIONS BELOW

The opinion of the post-conviction hearing court (circuit court of Multnomah County), unreported, is printed in the Record at page 194. The opinion of the Supreme Court of Oregon, — Ore. —, 407 P.2d 246 (1965), is printed in the Record at page 203.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

Constitution of Oregon, Article I, Section 11, provides:

"In all criminal prosecutions, the accused shall have the right to public trial by an impartial jury

in the county in which the offense shall have been committed; to be heard by himself and counsel; to demand the nature and cause of the accusation against him; and to have a copy thereof; to meet the witnesses face to face, and to have compulsory process for obtaining witnesses in his favor; provided, however, that any accused person, in other than capital cases, and with the consent of the trial judge, may elect to waive trial by jury and consent to be tried by the judge of the court alone, such election to be in writing; provided, however, that in the circuit court ten members of the jury may render a verdict of guilty or not guilty, save and except a verdict of guilty of first degree murder, which shall be found only by a unanimous verdict, and not otherwise; provided further, that the existing laws and constitutional provisions relative to criminal prosecutions shall be continued and remain in effect as to all prosecutions for crimes committed before the taking effect of this amendment."

OREGON REVISED STATUTES § 17.305 provides:

"*Deliberations of jury; custody of and communications with jury.* After hearing the charge, the jury may either decide in the jury box or retire for deliberation. If they retire, they must be kept together in a room provided for them, or some other convenient place, under the charge of one or more officers, until they agree upon their verdict or are discharged by the court. The officer, shall, to the utmost of his ability, keep the jury together, separate from other persons, without drink, except water, and without food, except ordered by the court. He must not suffer any communication to be made to them, nor make any himself, unless by the order of the court, except to ask them if they have agreed upon their verdict, and he shall not, before the verdict is rendered, communicate to any person the state of their deliberations or the verdict agreed on. Before any officer takes

charge of a jury, this section shall be read to him, and he shall be then sworn to conduct himself according to its provisions to the utmost of his ability."

OREGON REVISED STATUTES § 138.530 provides:

"When relief must be granted; executive clemency or pardon powers and original jurisdiction of Supreme Court in habeas corpus not affected. (1) Post-conviction relief pursuant to ORS 138.510 to 138.680 shall be granted by the court when one or more of the following grounds is established by the petitioner:

(a) A substantial denial in the proceedings resulting in petitioner's conviction, or in the appellate review thereof, of petitioner's rights under the Constitution of the United States, or under the Constitution of the State of Oregon, or both, and which denial rendered the conviction void.

(b) Lack of jurisdiction of the court to impose the judgment rendered upon petitioner's conviction.

(c) Sentence in excess of, or otherwise not in accordance with, the sentence authorized by law for the crime of which petitioner was convicted; or unconstitutionality of such sentence.

(d) Unconstitutionality of the statute making criminal the acts for which petitioner was convicted.

(2) Whenever a person petitions for relief under ORS 138.510 to 138.680, ORS 138.510 to 138.680 shall not be construed to deny relief where such relief would have been available prior to May 26, 1959, under the writ of habeas corpus, nor shall it be construed to affect any powers of executive clemency or pardon provided by law.

(3) ORS 138.510 to 138.680 shall not be construed to limit the original jurisdiction of the Supreme Court in habeas corpus as provided in the Constitution of this state."

QUESTION PRESENTED

Where a bailiff who is not a witness, allegedly makes statements referring to the accused as, "Oh, that wicked fellow, he is guilty," and "If you find him guilty and there is anything wrong, the Supreme Court will correct it," which are overheard by two jurors but not the other ten jurors and no prejudice is shown, is due process of law violated if finality is given the jury verdict?

STATEMENT

We accept the petitioner's statement of the case except for the omission of the following material facts which we feel are pertinent to the issue raised.

Petitioner was convicted of second degree murder on May 19, 1961, in the Multnomah County Circuit Court and was sentenced to the Oregon State Penitentiary for an indeterminate period of time, the maximum of which was the remainder of his natural life. (Record 2) Petitioner filed an appeal and the conviction was affirmed on September 5, 1963. 235 Ore. 366, 384 P.2d 986 (1963). Petitioner then filed a petition for rehearing on the appeal. This was denied October 8, 1963. *Id.*

Several months after his conviction in 1961, petitioner wrote a letter, dated September 7, 1961, to several of the jurors. (Record 32, 100, 105, 116, 119, 132) The contents of this letter mildly chastised the members of the jury, played on their sympathies and expressed petitioner's

displeasure with the verdict. (Appendix A) No further effort was made to contact the jurors until after the Oregon Supreme Court affirmed the petitioner's conviction. At this time petitioner furnished his wife with a tape recording and requested that she contact members of the jury in an effort to find new grounds for setting aside his conviction. (Record 16)

In response to petitioner's request Mrs. Parker, in October 1963, initiated the events which led to the filing of the amended petition for post conviction relief. (Record 11) The amended petition for post conviction relief was subsequently filed, and the hearing was held on June 22, 1964. (Record 10)

Mrs. Parker secured the names of the jurors and without previous knowledge that the jurors had any information on the issues presented here, contacted two of the regular jurors. (Record 12-13, 104) One juror, Mrs. Inwards, the juror who held out the longest in voting to find the petitioner not guilty (Record 183), told petitioner's wife that she would be willing to listen to the tape recording. (Record 21) In response to an inquiry by Mrs. Parker, as to who had held out the longest, Mrs. Inwards furnished the names of Mrs. Drake, a regular juror, and Mrs. Gattman, an alternate juror who did not participate in the verdict. (Record 21) Mrs. Inwards suggested that Mrs. Parker contact Mrs. Gattman because she was sure Mrs. Gattman would be willing to

discuss the matter as she had been disappointed in the verdict. (Record 31)

These three women, Mrs. Inwards, Mrs. Drake and Mrs. Gattman, discussed the matter and listened to the petitioner's tape recording in Mrs. Parker's home. (Record 13, 33, 36, 77, 83) The tape recording, among other items, asked questions about the same matters stated to have been seen or heard by these women in their affidavits. (Record 34) The tape recording may have been in Mrs. Parker's possession during the post conviction hearing (Record 16), but it was not produced as evidence nor accounted for during this hearing. The affidavits which resulted from these discussions provided the basis for petitioner's post conviction action.

Mrs. Inwards testified that part of her statement in the affidavit was untrue. (Record 52-55) Her testimony was not only impeached by the State, it was also impeached by petitioner's counsel when he tried to rehabilitate her testimony. (Record 58-59) Mrs. Inwards further testified that none of the incidents stated in her affidavit affected her verdict in any way. (Record 36-38, 40, 51, 62) She later stated the remarks could have affected her decision. (Record 180-181) However, she testified she also was so upset over the verdict that she would do anything to correct it. (Record 187, 189)

Mrs. Drake, the other regular juror was vague in stating exactly what she had overheard (Record 74-76),

yet she testified to the exact version of the remark which Mrs. Inwards repudiated as not being true. (Record 76)

It was only Mrs. Gattman, the alternate juror who took no part in the deliberations, who was sure of what the bailiff had said. It was her own statement which prompted the bailiff's remark "Oh, that wicked fellow, he is going to be . . . he is guilty." (Record 80, 85) Mrs. Gattman freely admitted that she was disturbed over the verdict (Record 78, 85) yet she made no effort to notify anyone of the bailiff's remark until after the trial. (Record 83, 85)

There is no evidence that any juror other than Mrs. Inwards and Mrs. Drake, both regular jurors, and Mrs. Gattman, an alternate, heard either of the alleged statements. Nine of the regular jurors and the one other alternate juror denied hearing the remark. (Record 86, 91, 95, 102, 106, 111, 117, 123, 129, 132, 152) Mrs. Drake, Mrs. Inwards and Mrs. Gattman did not discuss these alleged remarks prior to being contacted by Mrs. Parker, either among themselves, with the judge or with the other jurors. (Record 83, 186) The bailiff who allegedly made these remarks failed to corroborate them, rather he denied having discussed the case with any juror, regular or alternate. (Record 157-161, 165-168) The alleged remarks upon which the Supreme Court of Oregon based its decision are as follows: The remark, "Oh, that wicked fellow . . . , he is guilty" was allegedly made to

the alternate juror, Mrs. Gattman. (Record 80, 85) and was overheard by a regular juror, Mrs. Inwards. (Record 30, 43) The other remark, "If there is anything wrong the Supreme Court will correct it," was allegedly made to a man or woman juror not identified (Record 52) and was allegedly overheard by both regular jurors, Mrs. Drake, (Record 76) and Mrs. Inwards. (Record 30, 52) 407 P.2d 246, 247. The unidentified juror was never called to testify in the post conviction hearing or if present did not corroborate the alleged remark.

The post conviction trial court held that these statements violated the provisions of *Ore. Rev. Stat.* § 17.305 (Record 195), and that if the matter alleged in the post conviction petition had been called to the trial court's attention, that court on its own motion would have granted petitioner a new trial. (Record 199)

In reversing the post conviction trial court, the Supreme Court of Oregon held that the court below had erroneously applied the statutory standard for judging a motion for a new trial. 407 P.2d at 247.

The Oregon Post Conviction Act (*Ore. Rev. Stat.* § 138.530) provides that post conviction relief will be granted when it is established that there was a substantial denial of the petitioner's constitutional rights which would render the conviction void. The Oregon Supreme Court determined that neither the petitioner's federal nor state constitutional rights had been denied. 407 P.2d at 248.

SUMMARY OF ARGUMENT

The evil of permitting jurors to attempt to impeach their verdict was made convincingly clear at the post conviction trial in this case. Through the use of letters, phone calls, a tape recorder, personal contact, and group discussions over a period of time, the petitioner was able to secure from the jurors, certain affidavits alleging defects in his trial.

This type of post trial conduct by a convicted defendant has not been sanctioned by this Court in the past, nor should it be sanctioned in the future. The integrity of the jury proceeding must not be jeopardized by unauthorized invasions of this nature. A juror must be free to exercise his function without the continuing threat of a future investigation and subsequent interrogation. The privilege of being a juror should not carry with it the loss of personal privacy at a later date.

Granting finality to a jury verdict is the only method which will insure the free exercise of discretion on the part of the jurors. It will also protect jury members, when they resume the role of private citizen, from harassment and intimidation from disgruntled jurors as well as disappointed litigants. The impact of any other policy towards the finality of the jury verdict will render the jury system subject to undesirable outside pressures. The result will surely be the destruction of the secrecy necessary to our system of justice.

The harmless, inconsequential remarks allegedly made by the bailiff did not prevent the petitioner from receiving a fair trial. These remarks were not substan-

tiated by the bailiff, nor were they communicated to the other jurors. None of the three jurors involved manifested any prejudice towards the petitioner. The three women jurors were those most sympathetic to the petitioner's cause. Because no prejudice can be shown, there has been no denial of petitioner's constitutional rights. There is no reason to set the verdict aside.

ARGUMENT

I—PUBLIC POLICY REQUIRES THAT FINALITY BE ACCORDED A JURY VERDICT

The implication of petitioner's argument if accepted by this court would render every jury verdict subject to re-opening at a later date. The present facts offer a clear and convincing example of the post trial harassment discussed in *Stein v. People,* 346 U.S. 156 (1953).

The petitioner contacted the jurors by letter several months after the penalty trial. (Record 32, 100, 105, 116, 119, 132) This letter expressed displeasure with the verdict and implied that the jury members were victims of an unfair judicial system. (Appendix A) No further contact was made with the jurors until petitioner's conviction was affirmed on appeal. Immediately after the affirmance, Mrs. Parker contacted two regular jurors and one alternate juror. (Record 12-13, 104) The three women jurors were then subjected to a "discussion" with petitioner's wife and petitioner's attorney. Prior to meeting with the attorney these three women jurors listened to a tape recording by petitioner, in which the same general

subject matter was discussed as appeared in their affidavits. (Record 13, 33, 34, 36, 77, 83) The fact that none of these incidents or remarks was brought to the attention of the trial court, the other jury members, or any attorney or other officer of the court prior to the contact of the jurors by Mrs. Parker leads to the inescapable conclusion that the three women jurors were "brain washed" over the six months period of time before the affidavits were made.

This court has not favored any public or private post trial inquisition of jurors. The question of post trial intimidation and harassment of jurors was discussed in *Stein v. People*, 346 U.S. 156, 178, wherein this court said:

> " 'If evidence thus secured could be thus used, the result would be to make what was intended to be a private deliberation, the constant subject of public investigation; to the destruction of all frankness and freedom of discussion and conference.' *McDonald v. Pless* supra, 238 US at pages 267-268, 35 US Ct at page 784."

The reasons for preventing this type of jury harassment are stated in *United States v. Crosby*, 294 F.2d 928, 950, (C.A.2 1961):

> "There are many cogent reasons militating against post-verdict inquiry into jurors' motives for decision. The jurors themselves ought not be subjected to harassment; the courts ought not be burdened with large numbers of applications mostly without real merit; the chances and *temptation for tampering ought not be increased;* verdicts ought not be made so uncertain. * * *" (Emphasis supplied)

This reasoning has as a valid object, the preservation of final jury determinations and ultimately the protection of the sanctity of the jury process. See *Castaldi v. United States*, 251 F. Supp. 681 (E.D. Mo. 1966) and *United States v. Procario*, 356 F.2d 614 (C.A.2 1966) (U.S. appeal pending). The protection of the jurors from invasions of their home, professional and private life by dissatisfied litigants will be non-existent if harassment of this nature and magnitude is condoned. In addition if the court opens up the jury to investigation and post trial interrogation of this nature, the secrecy necessary to the deliberative process will be destroyed. This is shown by the following from *Clark v. United States*, 289 U.S. 1, 13 (1932):

> "* * * Freedom of debate might be stifled and independence of thought checked if jurors were made to feel that their arguments and ballots were to be freely published to the world. * * *"

Calling back jurors for post trial interrogation after they have been discharged is an extraordinary procedure. In this instance authorizing a delay of two years after the penalty trial will be an open invitation to jury tampering by disgruntled jurors as well as disappointed litigants. The jury loses its identity after it is discharged. *State ex rel. D'Andrea v. Smith*, 183 So.2d 34 (Fla. 1966). Each individual serving as a juror will be subject to harassment as a private citizen, not as a juror. This certainly is an unreasonable and unnecessary burden to place on the privilege of being a juror. See *State v. Athorn*, 46 N.J. 247, 216 A. 2d 369 (1966).

This is summed up in the oft quoted decision of *McDonald v. Pless,* 238 U.S. 264, 268 (1915):

> "* * * For, while it may often exclude the only possible evidence of misconduct, a change in the rule 'would open the door to the most pernicious arts and tampering with jurors.' 'The practice would be replete with dangerous consequences.' 'It would lead to the grossest fraud and abuse,' and 'no verdict would be safe.' * * *"

Denying a convicted defendant the right to probe a jury verdict for vulnerability is not a denial of due process of law. *United States v. Provenzano,* 240 F. Supp, 393, 412, (D. N.J. 1965).

The Supreme Court of Oregon recognized that public policy considerations demanded that finality be given to a jury verdict. This case was decided on an adequate state ground in order to maintain this public policy. The Oregon Supreme Court said:

> "Trial by jury is the most satisfactory method we have yet devised to determine disputed facts. We know, however, that it is a rough imperfect instrument, not a precision tool. We know it is influenced by inside prejudices and outside influences, as is any other human institution. Because it is the best procedure we have, we hide its imperfections by granting finality to its verdict." 407 P.2d 246, 250.

II—THE EVIDENCE SUPPORTING PETITIONER'S ALLEGATIONS IS TOO INSUBSTANTIAL TO IMPUTE PREJUDICE TO THE JURY.

The main thrust of this inquiry is whether there has been an effect on the substantial rights of the petitioner.

We are not concerned with the selection of a jury, nor with pre-trial publicity, nor with an "environing atmosphere" of guilt. We are here concerned with the effect of an alleged remark on one or two members of a duly constituted jury. For this reason the cases cited by petitioner as the standard required of a jury trial are inapplicable. The decisions *Rideau v. Louisiana*, 373 U.S. 723 (1963) (wherein blatant and strong adverse publicity made prejudice inherent); *Sheppard v. Maxwell*, 384 U.S. 333 (1965) (an "environing atmosphere" of guilt) and *Irvin v. Dowd*, 366 U.S. 717 (1961) (entire jury infected prior to trial with prejudice) all deal with out of court influences which is not the fact situation presented here. *Turner v. Louisiana*, 379 U.S. 466 (1965) presented a constant continuous association and supervision of the jury by important prosecution witnesses. Every single juror in *Turner* was subjected to prolonged intimate contact with these witnesses with the knowledge of the trial court. This is clearly not the case here. The present facts reveal at most, an accidental blurting out, without trial court knowledge, of two statements to two regular jurors and one alternate juror. There was no showing that either of these remarks was overheard by nine of the regular jurors and the other alternate juror (Record 86, 95, 102, 106, 111, 117, 123, 129, 132, 152). In fact the juror that held out the longest against conviction stated she was not influenced in her decision by the remarks. (Record 36-38, 40, 51, 62) She later revised her testimony, and said it could have affected her decision. (Record 180-181) The other regular juror was so vague and equivocal

in her testimony that doubt is placed on the effect, if any, these remarks had on her decision. (Record 74-76)

Though these alleged remarks may be presumed prejudicial, *Remmer v. United States*, 347 U.S. 277 (1954), actual prejudice is necessary before the verdict may be overturned. *Irvin v. Dowd, supra; Beck v. Washington*, 369 U.S. 541 (1962). The hearing required by *Remmer* to determine prejudice was conducted. On review of this hearing, these remarks were adjudged not prejudicial to the petitioner. 407 P.2d (1965). In view of the contradictions of the two regular jurors and the one alternate, and the fact that both regular jurors testified they were not affected by the remarks, (Record 36-38, 40, 51, 62) there was no actual prejudice. Surely the presumption of prejudice is not equated with actual prejudice. The opportunity for prejudice existed but the equivocal testimony in the record reveals it to be mere speculation as to whether it actually existed. As Mr. Justice Holmes said in *Holt v. United States*, 218 U.S. 245 (1910):

> "* * * If the mere opportunity for prejudice or corruption is to raise a presumption that they exist, it will be hard to maintain jury trial under the conditions of the present day. * * *"

The contact in this case does not reach the level condemned in *Turner*. No confidence was shown to have been placed in the bailiff's remark; he was not instrumental to the prosecution of the case. The effect of two inconsequential remarks, during an eight day trial, is minimal at most. Especially since the petitioner's key witness, Mrs. Inman, could only testify equivocally that the remark "could have affected her decision". (Record

180) See *Guillory v. State*, 400 SW2d 751 (Tex. 1966). Without a clear showing of prejudice because of this communication there is no need for a new trial. *Remmer v. United States, supra. United States ex rel. Moore v. Fay*, 238 F. Supp. 1005 (S.D. N.Y. 1965); *Beck v. Washington, supra.*

CONCLUSION

Two and one-half years after the Oregon jury rendered its verdict in petitioner's criminal case, petitioner managed to upset that verdict by a process of personal interviews, tape recordings, letters, and, other persuasive tactics on pliable jurors.

The Oregon State Supreme Court confronted with this record and the bailiff's remarks, held that the public policy considerations requiring the giving of finality to jury verdicts outweighed any possible prejudice that could be inferred from the remarks made by the bailiff.

In view of the equivocal record which failed to show actual prejudice, we submit that the Supreme Court of Oregon was justified in giving finality to the jury verdict.

Respectfully submitted,

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APPENDIX A

No. 300-600
Dft. Exh. 5
Sulmonetti, Judge
C. Cusick, Clerk
Rec'd

Dear Mr. George V. Kolibaba

It has come to my attention that various members that served on the jury at my trial tend to feel somewhat upset regarding the verdict they returned. Being the princkple (sic) pers_n (/) at this proceedings, I of all persons can well understand and appreciate your position. I have had much time in which to dwell on all aspedts (sic) of my case, and to analyze the outcome. Had I, my mother, or any of my family been called upon to serve as possible under the pressing procedures involving the despensation (sic) of justice after the evidence, such as it was, being presented to us.

It is understandable how a layman can be misled "by belaboring and repeating at great length the same inference for lack of proof", being human and therefore alwaus (sic) subject to human error. The erros (sic) is, in large measure my own and not only yours or the others who served and returned the verdict. More in error, I believe, (although there are some who might "cry sour grapes") are the prosecuting attorney, Mr. Oscar Howlett; the Portland City Police and my two attornies (sic) with whom I was forced to place my future. A certain degree of blame must rest on the trial judge and, as stated, I

muself (sic) must shoulder some of the burden. My error by large was trusting my attornies (sic), lack of knowledge of the law, court proceedings and not being in a position financally (sic) to arrange for adequate counsel to determine the truth. At this point, I am quite sure, I could have done better without these attornies (sic). The court ordered me to say nothing except through these gentlemen. This was his error, but I had to respect his orders. For the sake of didcussion (sic) it was my intention to put the defense case on and take the witness stand. My attornies (sic) informed me that they would walk out on me if they were not allowed to do it their way. What would you have done? I did what I thought was best at the time and under their pressures. You as a juror also did what you believed to be best under pressure that you no doubt have never experienced before and therefore had no yardstick by which you could measure the unusual task put before you. My error led you to yours, which has cost me long months in jail, my daughter, my mother, not to mention a great deal of respect for American jurisprudence.

For what it is worht; (sic) I feel great sorrow that you found yourself in the position to judge your fellow man and find it necessary to return the verdict you did. When I think how easy it was for the prosecution to manipulate the evidence in the eyes and minds of persons inexperienced with legal proceedings, I wonder if _merica (/) is safe in the hands of the people that control . . . people I fought for . . . and if my daughter will be safe under this system of law. I am sure now that the Ameri-

can system of justice is out of step and far behind the rest of the world. Only the wealthy are in any degree safe under it. It is a necessity, therefore, that our juries are allowed to think for themselves and weigh the facts —not the few that the prosecution presents in order to show just the degree of guilt necessary to convict, and omitting any that mihgt (sic) tend to show innocence.

It might be interesting for you to know that at the first trial, April 1958 the prosecuting attorney, Mr. Oscar Howlett tried me for killing Mr. Hollaway on 2nd and Jefferson St. Portland, knowing this was false. In fact, Mr. Howlett knows I am innocence (sic), that I never said any man was the father of my daughter but myself. That I have fought for her since she was born—fought every way I could. In fact I fought so hard in court, that her mother testified falsely to keep me from having her.

By your return verdict, together with the other jurors who served, she will be grown and I can never experience the joy of seeing her grow to a young lady. Her mother has boasted to the world that "Lee can't get her now, I'm proud he got life". This could have been brought to your attention had I wanted it. I was sure the people I chose for the jury would assume I was innocent until some proff (sic) of guilt was presented. I now see that I was in error.

The truth is not always pleasant to hear. A person that speaks the truth does not worry about the effect it has on others. I speak what I believe is the truth regardless, even though it is sometime difficult. It is hard to write

you and be honest without saying things you perhaps don't want to hear.

For what it is worth:

1. I, not Bob, am the father of my daughter.
2. I am not guilty of any part of this crime.
3. I don't know where Bob died, why, how or when.
4. My so called girl friend had to testify as she did or go to prison herself for other crimes.
5. The police know I am innocent, that I would have sued them had I not been convicted. The same goes for Mr. Howlett.
6. I work for a living. I never did hang out in the bars on third avenue in the constant manner you were led to believe.
7. Bob Holloway and I worked, lived and traveled over Washington, Oregon, Nevada, California, and Canada since I met him in 1948. We worked on more than one job in the mountians (sic) by ourselves and never had any trouble.
8. Mr. Cole, Mr. Young and many others had to testify as they did, or go to jail.

I leave it to you to find your own private verdict. I would appreciate hearing from you if it wouldn't further inconvenience you. It is legal and nothing but your conscience can dictate what you feel is right after due consideration.

Your truly,
/s/ Lee Parker

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SUPREME COURT OF THE UNITED STATES

No. 81.—October Term, 1966.

Lee E. A. Parker, Petitioner, *v.* Clarence T. Gladden, Warden of the Oregon State Penitentiary.	On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 12, 1966.]

Per Curiam.

Petitioner, after his conviction for second degree murder, 235 Ore. 366, 384 P. 2d 986, filed a petition for post-conviction relief, Ore. Rev. Stat. § 138.550. At a hearing on the petition the trial court found that a court bailiff assigned to shepherd the sequestered jury, which sat for eight days, stated to one of the jurors in the presence of others while the jury was out walking on a public sidewalk: "Oh, that wicked fellow [petitioner], he is guilty";[1] and on another occasion said to another juror under similar circumstances, "If there is anything wrong [in finding petitioner guilty] the Supreme Court will correct it."[2] Both statements were overheard by at least one regular juror or an alternate. The trial court found "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the [petitioner]." The Supreme Court of Oregon reversed, finding that "the bailiff's misconduct did not deprive [petitioner] of a constitutionally fair trial." — Ore. —, 407 P. 2d 246. We granted certiorari, 384 U. S. 904. The federal question decided by Oregon's highest

[1] The statement was made to alternate juror Mrs. Gattman and was overhead by juror Mrs. Inwards.

[2] The statement was made to an unidentified juror and overheard by juror Mrs. Drake.

court is, of course, subject to final determination in this Court and we have concluded that the judgment must be reversed.

We believe that the statements of the bailiff to the jurors are controlled by the command of the Sixth Amendment, made applicable to the States through the Due Process Clause of the Fourteenth Amendment. It guarantees that "the accused shall enjoy the right to a . . . trial, by an impartial jury . . . [and] be confronted with the witnesses against him. . . ." As we said in *Turner* v. *Louisiana*, 379 U. S. 466, 472–473 (1965), "the 'evidence developed' against a defendant shall come from the witness stand in a public courtroom where there is free judicial protection of the defendant's right of confrontation, of cross-examination and of counsel." Here there is neither dispute as to what the bailiff, an officer of the State, said nor that when he said it he was not subjected to confrontation, cross-examination or other safeguards guaranteed to the petitioner. Rather, his expressions were "private talk," tending to reach the jury by "outside influence." *Patterson* v. *Colorado*, 205 U. S. 454, 462 (1907). We have followed the "undeviating rule," *Shepherd* v. *Maxwell*, 384 U. S. 333, 351 (1966), that the right of confrontation and cross-examination are among the fundamental requirements of a constitutionally fair trial. *Kirby* v. *United States*, 174 U. S. 47, 55, 56 (1899); *In re Oliver*, 333 U. S. 257, 273 (1948); *Pointer* v. *Texas*, 380 U. S. 400 (1965).

The State suggests that no prejudice was shown and that no harm could have resulted because 10 members of the jury testified that they had not heard the bailiff's statements and that Oregon law permits a verdict of guilty by 10 affirmative votes. This overlooks the fact that the official character of the bailiff—as an officer of the court as well as the State—beyond question carries great weight with a jury which he had been shepherding

for eight days and nights. Moreover, the jurors deliberated for 26 hours, indicating a difference among them as to the guilt of petitioner. Finally, one [3] of the jurors testified that she *was* prejudiced by the statements which support the trial court's finding "that the unauthorized communication was prejudicial and that such conduct materially affected the rights of the defendant." This finding was not upset by Oregon's highest court. Aside from this, we believe that the unauthorized conduct of the bailiff "involves such a probability that prejudce will result that it is deemed lacking in due process," *Estes* v. *Texas,* 381 U. S. 532, 542–543 (1965). As we said in *Turner* v. *Louisiana, supra,* "it would be blinking reality not to recognize the extreme prejudice inherent" in such statements that reached at least three members of the jury and one alternate member. The State says that 10 of the jurors testified that they had not heard the statements of the bailiff. This, however, ignores the testimony that one of the statements was made to an unidentified juror, which, including Mrs. Inwards and Mrs. Drake, makes three. In any event, petitioner was entitled to be tried by 12, not 9 or even 10, impartial and unprejudiced jurors. See *State* v. *Murray,* 164 La. 883, 887.

Reversed.

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[3] Mrs. Inwards when recalled to the stand testified in response to a question by the court that "all in all it must have influenced me. I didn't realize it at the time."

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SUPREME COURT OF THE UNITED STATES

No. 81.—October Term, 1966.

Lee E. A. Parker, Petitioner, v. Clarence T. Gladden, Warden of the Oregon State Penitentiary.	On Writ of Certiorari to the Supreme Court of the State of Oregon.

[December 12, 1966.]

Mr. Justice Harlan, dissenting.

By not setting forth the background of this proceeding the Court has put seriously out of focus the constitutional issue involved in this case.

Parker was convicted of second degree murder on May 19, 1961, and sentenced to life imprisonment. On September 7, 1961, he addressed a letter to several jurors protesting his innocence, condemning his attorneys for incompetence, intimating that witnesses were coerced into lying, and chiding the jurors for being duped into finding him guilty. After affirmance of his conviction by the Supreme Court of Oregon on September 15, 1963—some two years after the jury verdict—Parker again set out to take his case to the jury. He furnished his wife with a tape recording in which he propounded a series of questions designed to uncover possible improprieties in the jury's deliberations. The jury had deliberated a long time and Parker had been told that their discussion was heated. Although unaware of any irregularities he commenced "shooting in the dark." (Tr., p. 16.) Mrs. Parker then acquired a jury list and discovered those jurors who had been most sympathetic to her husband.[1]

[1] The record shows that Mrs. Parker first called juror number one, Mrs. Inwards, and upon finding her sympathetic obtained from her the names of those who had held out longest. Mrs. Inwards also informed Mrs. Parker that an alternate juror, Mrs. Gattman, was sympathetic to Parker's cause.

She invited two regular jurors and an alternate to her home to listen to the recording and discuss the case. An attorney was then retained to prepare affidavits detailing the allegations before us and to institute this post-conviction proceeding. The statements before this Court were found to have been made by this apparently Elizabethan-tongued bailiff, but contrary to this Court's assertion the trial court found that these statements were only prejudicial in nature and not that they had a prejudicial effect.[2] The Oregon Supreme Court did not find the trial proceedings fundamentally unfair.

This Court finds the bailiff's remarks to be in violation of the Sixth Amendment's confrontation requirement. Although I believe that "a right of confrontation is 'implicit in the concept of ordered liberty,'" *Pointer* v. *Texas*, 380 U. S. 400, 408 (concurring opinion of HARLAN, J.), I cannot accede to the view that the Sixth Amendment is directly applicable to the States through the Fourteenth. As to the confrontation problem here asserted, I know of no case in which this Court has held that jurors must have been absolutely insulated from all

[2] The trial court purported to follow the State Supreme Court's decision in *State* v. *Kristich*, 226 Ore. 240, which held that where a bailiff had communicated with a jury on a point of law prejudice would be presumed. Thus the trial court said that "if the matters alleged in plaintiff's petition had been called to the Court's attention, the Court, on its own motion, would have granted the defendant a new trial," and held that Parker deserved a new trial because the communication was of a prejudicial nature. The Oregon Supreme Court reversed because it held that the trial court erroneously applied the new trial standard to a post-conviction proceeding where only error of constitutional magnitude would serve to overthrow the verdict. The Supreme Court made no specific finding on prejudice but in distinguishing *Turner* v. *Louisiana*, 379 U. S. 466, noted a "difference in degree of the out-of-courtroom influence . . . so great as to lead us to the conclusion that the bailiff's misconduct did not deprive defendant of a constitutionally correct trial."

expressions of opinion on the merits of the case or the judicial process at the risk of declaration of a new trial. *Irvin* v. *Dowd*, 366 U. S. 717. Even where this Court has acted in its supervisory capacity it has refused to hold that jury contact with outside information is always a cause for overthrowing a verdict, wisely preferring to allow "each case . . . . [to] turn on its special facts." *Marshall* v. *United States*, 360 U. S. 310, 312. The Court notes that these remarks were made by a state officer, but does not explain why the bailiff's official capacity would in this instance make him any more a "witness" than any other person able to communicate with the jury. Thus, though I believe unintentionally, the Court's opinion leaves open the possibility of automatically requiring a mistrial on constitutional grounds whenever any juror is exposed to any potentially prejudicial expression of opinion.

Considering this case, as I would, under the doctrine of fundamental fairness implicit in the Due Process Clause of the Fourteenth Amendment, I think a different result follows. Much reliance has been placed upon *Turner* v. *Louisiana*, 379 U. S. 466. But in *Turner* we faced a situation in which the trial court allowed two deputy sheriffs who were key witnesses to be placed in "continuous and intimate association" with the jury, and it would have been "blinking reality not to recognize the extreme prejudice inherent in this situation." 379 U. S., at 473. There too we faced "a procedure employed by the State" involving "such a probability that prejudice will result" that we deemed it "inherently lacking in due process." *Estes* v. *Texas*, 381 U. S. 532, 542–543. Here no procedure adopted by the State is to be faulted and it seems clear to me that the rule of *Stroble* v. *California*, 343 U. S. 181, and *Irvin* v. *Dowd*, *supra*, should apply and a substantial showing of prejudice in fact must be made before a due process violation can be found.

On this basis the occurrences before us seem inconsequential to me in light of the eight-day trial and twenty-six hour jury deliberation. And my feeling is confirmed by the extremely trivial evidence of prejudice amounting to no more than an assertion by one obviously highly emotional and "guilt"-ridden juror that she might have been influenced without realizing it.[3] "[I]t is an impossible standard to require that tribunal [the jury] to be a laboratory, completely sterilized and freed from any external factors." *Rideau* v. *Louisiana*, 373 U. S. 723, 733 (CLARK, J., dissenting).

The potentialities of today's decision may go far beyond what, I am sure, the Court intends. Certainly the Court does not wish to encourage convicted felons to "intimidate, beset and harass," *Stein* v. *New York*, 346 U. S. 156, 178, a discharged jury in an effort to establish possible grounds for a new trial. Our courts have always been alert to protect the sanctity of the jury process. *McDonald* v. *Pless*, 238 U. S. 264; see *Castaldi* v. *United States*, 251 F. Supp. 681. But in allowing Parker to overturn his conviction on the basis of what are no more than inconsequential incidents in an otherwise constitutionally flawless proceeding, the Court encourages others to follow his example in pursuing the jury and may be thought by some to commit federal courts in habeas to interrogate the jury upon the mere allegation that a

[3] Mrs. Inwards, who on recall testified that she must have been unconsciously influenced, denied any influence when first examined. In her further testimony she admitted that she was extremely upset by the verdict and would do anything short of committing perjury to overturn it. She stated, however, that although she had gone to the trial judge to discuss the verdict she had never mentioned the bailiff's remarks to him. In specifying that the bailiff's remarks "must" have influenced her she limited herself to declaring that they did so in connection with the pressure put on her by other jurors during the deliberations thus stating that "all in all" she "must" have been influenced.

prejudicial remark has reached the ears of one of its members. *Remmer* v. *United States*, 347 U. S. 227. To any such result I cannot subscribe.

I think the Oregon Supreme Court correctly assessed the constitutional issue before us, and I would affirm its judgment.